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In the

Supreme Court of the United States

October Term, 1939.

L. Singer & Sons, a Corporation, *et al.*, *Petitioners*,

vs.

Union Pacific Railroad Company, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Roby D. Garrett,
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Counsel for Petitioners.

[illegible] PRINTING COMPANY, KANSAS CITY, MO.

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In the

Supreme Court of the United States

October Term, 1939.

L. SINGER & SONS, a Corporation, *et al.*, *Petitioners*,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation, *Respondent.*

No. .....

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

May it Please the Court:

Your petitioners, L. Singer & Sons, a corporation, *et al.*,[1] respectfully petition this Court to grant a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, and to remove therefrom to this Court, for review, the record of the case therein lately

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[1]The names of all the petitioners are as follows: L. Singer & Sons, a corporation; Wm. F. Helm, doing business as Wm. F. Helm Produce Company; Arthur Harris, doing business as Kansas City Fruit & Produce Company; Robert T. Kesting, doing business as H. Kesting Produce Company; Chester F. Urban, doing business as Maguire-Urban Commission Company; Fara D'Angelo, doing business as D'Angelo Celery House; R. E. Mills, doing business as Mills Produce Company; H. R. Raker, doing business as Raker Produce Company; Ralph Hurst; Ralph Hurst & Company, a corporation; Reuben Kaplan, doing business as Royal Food Stores; Earl J. Tranin; Merchants Bank Building & Investment Company, a corporation, and North Side Business & Improvement Association, a *pro forma* decree corporation.

pending of L. Singer & Sons, *et al.*, Appellants, v. Union Pacific Railroad Company, Appellee, being case No. 11480 on the docket of that court.

This was a suit brought by petitioners, who are commission or produce merchants and property owners within and adjacent to the City Market of Kansas City, Missouri, to enjoin the respondent from constructing and operating an extension of its line of railroad to a proposed rival produce market and terminal in Kansas City, Kansas, until respondent shall have procured a certificate of convenience and necessity from the Interstate Commerce Commission pursuant to the provisions of paragraph (18), Section 402 of the Transportation Act (Act of Congress approved February 28, 1920, 41 Stat. 477, 49 U. S. C. A. 1 [18]).[2]

The extent of respondent's participation in the project is shown by the fact that the cost of the railroad tracks and facilities constructed and to be constructed by respondent is about $500,000.00. In addition, respondent assisted in financing the construction of the market by purchasing $3,000,000.00 of revenue bonds issued by Kansas City, Kansas. The total cost of the market is approximately $4,000,000.00.

In the decision sought to be reviewed, decided February 7, 1940 (R. 42), (not yet reported) the majority of the Circuit Court of Appeals held that petitioners are not "parties in interest" entitled to maintain a suit to enjoin the unauthorized, and therefore, as alleged, unlaw-

[2]The pertinent parts of said paragraph read as follows:

No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad. . . .

ful extension of a line of railroad under the provisions of paragraph (20), Section 402 of the Transportation Act (41 Stat. 478, 49 U. S. C. A. 1 [20]). A vigorous dissenting opinion (R. 49) was rendered by Circuit Judge Kimbrough Stone, who was of opinion that petitioners were "parties in interest," relying in part upon the decisions of this Court in *Western Pacific California Railroad Co.* v. *Southern Pacific Company*, 284 U. S. 47, and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266.

A certified copy of the record, including the proceedings in the Circuit Court of Appeals for the Eighth Circuit, and additional copies of said record and proceedings, as required by Rule 38 of the Rules of this Court, have been forwarded to the Clerk of this Court by the Clerk of the Circuit Court of Appeals for the Eighth Circuit.

I.

Summary and Short Statement of the Matters Involved.

The principal question involved in this petition is: Whether the United States Circuit Court of Appeals for the Eighth Circuit was in error, as we contend it was, in affirming (R. 42) (not yet reported) a decree of the District Court of the United States for the Western Division of the Western District of Missouri (R. 25, 30) (26 F. Supp. 721), dismissing petitioners' complaint (R. 1) because under the allegations thereof the petitioners are not "parties in interest" entitled to maintain this suit under the provisions of paragraph (20), Section 402 of the Transportation Act (Act of Congress approved

February 28, 1920, 41 Stat. 478, Title 49 U. S. C. A. Section 1, paragraph 20).[3]

Briefly stated, the complaint (R. 1) alleges that respondent proposes to construct and operate in interstate commerce, at the cost of some $500,000, an "extension" of its line of railroad which will serve a large produce market costing approximately $4,000,000.00, which is to be constructed by the City of Kansas City, Kansas; that petitioners are produce or commission merchants who own or have places of business within or in connection with a similar market which has long been established in Kansas City, Missouri, and which has adequately served the two cities; and that the Kansas City, Missouri, market is now adequately served by a number of railroads. It is further alleged in the complaint that the change in the transportation situation which will be created by the unauthorized, and therefore unlawful, extension of respondent's line of railroad may directly and adversely affect your petitioners' welfare. More specifically, petitioners would be injured by reason of the fact that the construction and operation of the proposed extension would: Destroy or seriously and adversely affect the businesses, properties and the large financial investments of petitioners within and adjacent to the existing Kansas City, Missouri, market; create a rival produce market, far removed from the center of population and inconvenient to a greater majority of the citizens of the two

[3]The pertinent parts of the paragraph referred to read as follows: . . . From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulatory body of the state or states affected, *or any party in interest* . . . (Italics ours.)

cities, without any increase in the amount of business handled and notwithstanding the fact that the present Kansas City, Missouri, market is entirely adequate; result in unnecessary and wasteful duplication of railroad facilities, at a cost of over $500,000.00, with no increase in freight to be handled; divert traffic to respondent from other railroads which are now adequately handling the traffic to the existing produce market; cause destructive competition between railroads serving the two cities and impair the adequacy of their service to petitioners; and result in wasteful and needless expenditures by respondent.

The complaint is set forth in full at pages 1 to 5 of the record.

Respondent's answer (R. 20) asserted four defenses, the first three of which said defenses were: (1) That the court had no jurisdiction over the subject matter of the action; (2) That petitioners are not parties in interest under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Section 1, Par. 20) and were not authorized to institute or maintain any action thereunder; and (3) That the complaint failed to state a claim against defendant upon which relief could be granted.

After the filing of the aforesaid answer, the respondent made application to the District Court to hear and determine before trial the first three defenses set forth therein (R. page 24). The hearing was granted, no evidence was offered, and the case was submitted to the court on the pleadings and briefs of counsel.

The District Court held that it had jurisdiction of the suit but that the respondents were not "parties in interest" within the meaning of the statute and hence could

not maintain the action, and that, as a consequence, the complaint failed to state a claim upon which relief could be granted.

Petitioners herein, as plaintiffs, then appealed to the Circuit Court of Appeals for the Eighth Circuit. On February 7, 1940, the Circuit Court, by a two to one decision, affirmed the decree of the District Court. A strong dissenting opinion was written by Judge Stone.

The question whether petitioners are parties in interest within the meaning of paragraph (20) of Section 402 of the Transportation Act was duly raised and passed upon at all stages of the proceeding. After the filing of the complaint by petitioners, defendant filed an answer (R. 20) alleging as a second defense that plaintiffs were not parties in interest under the provisions of said Section. The District Court upheld that contention in paragraph 3 of its decree (R. 25). Petitioners in their statement of points on appeal alleged in paragraph III thereof that the lower court erred in holding that plaintiffs were not such parties in interest (R. 34). The majority opinion of Circuit Court of Appeals upheld the contention that plaintiffs were not parties in interest (R. 42), and petitioners assign such action as error in their specifications of errors herein.

It will be observed that the Circuit Court of Appeals merely found that parties in the situation of petitioners have not "as yet" been regarded as "parties in interest" within the meaning of that statute. It was said in the majority opinion (R. 48):

> "We realize that the meaning of the words 'party in interest' as used in Section 402, paragraph (20), of the Transportation Act *might be expanded so as to include parties standing in the situation of these plaintiffs and of Kansas City, Missouri.* We think

> that as yet persons in their situation have not been regarded as being 'parties in interest' who may maintain a suit such as this." (Italics ours.)

It is petitioners' position that, on the contrary, the complaint, as pointed out clearly in the dissenting opinion, showed how the welfare of petitioners would be directly and adversely affected as a result of the proposed extension; how petitioners would suffer a direct financial loss; and how the rail service which they now receive might be impaired, all as a result of the material change in the transportation situation created by the proposed extension of respondent's railroad. After describing the essential allegations of the complaint in substantially the same manner as we have hereinbefore, the following conclusion is stated in the dissenting opinion (R. 52):

> "Without attempting further to define that 'welfare' which, if 'directly and adversely' affected, brings one within the Act, it is sufficient for our present purposes that direct financial loss is within the Act. Such financial loss is clearly stated in this petition and might naturally result from the situation pleaded therein. I think the plaintiffs stated enough in the petition to give them the standing of a 'party in interest' within the intendment of the Act."

As explained in Judge Stone's dissenting opinion, the same reasoning upon which the Court held that the Western Pacific California Railroad Company was a party in interest in the case of *Western Pacific California Railroad Company* v. *Southern Pacific Company*, 284 U. S. 47, 51-52, would establish that petitioners are parties in interest within the meaning of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49, U. S. C. A., Section 1, paragraph [20]).

Referring to the above case, Judge Stone said (R. 52):

> "The court states two general classes of persons as within the definition, to-wit: those having some definite legal right seriously threatened or those whose 'welfare' 'may be directly and adversely' affected 'by bringing about some material change in the transportation situation.'
>
> "The latter class was involved in that case as it is in the case before us. The main, apparently the only, direct and adverse effect upon the plaintiff in that case was that of competition through the trackage contemplated by the Southern Pacific (p. 52). This effect was, obviously, a business—a financial—effect. Such an effect was 'something more than a common concern for obedience to law'. (*Western Pacific California Railroad Company, supra,* p. 51). Without attempting further to define that 'welfare' which, if 'directly and adversely' affected, brings one within the Act, it is sufficient for our present purposes that direct financial loss is within the Act. Such financial loss is clearly stated in this petition and might naturally result from the situation pleaded therein."

It is apparent from the complaint that petitioners come within the second, if not within the first, of the two general classes of persons which this Court found in the Western Pacific California Railroad Company case, *supra,* to be parties in interest within the meaning of the statute involved. The allegations of the complaint clearly establish that their "welfare" "may be directly and adversely" affected by the proposed "material change in the transportation situation." They may suffer financial loss growing out of the damage to their business and property resulting from the creation and operation of a rival market made possible by the change in the transportation situation, and they also may be subjected to a loss of

transportation service supplied by competing railroads whose service may be curtailed as a result of impairment of their revenues by reason of the new competition set up by the change in the transportation situation. They are thus shown to come within the class of persons which Congress sought to protect through the enactment of the statute.

Judge Stone also referred to the importance of the question involved in this case. He said (R. 49):

> "I am constrained to state the grounds for such dissent * * * also *by what I conceive to be the importance of this decision to the efficient operation of the provision of this Act* requiring certificates of convenience and necessity before extensions of railway trackage are permissible (U. S. C. A. Title 49, Section 1, par. 18)." (Italics ours.)

Petitioners contend that the majority of the Circuit Court of Appeals erroneously construed the meaning of "any party in interest" as used in the statute and as interpreted by this Court in *Western Pacific California Railroad Company* v. *Southern Pacific Company, supra.*

The majority opinion of the Circuit Court of Appeals appears to be based primarily upon the meaning of "party in interest" as the term is commonly accepted by courts of equity. As used in the statute under which petitioners brought this action, the phrase has a special, broader and more comprehensive meaning. This Court said in the Western Pacific California Railroad Company case, *supra* (284 U. S., l. c. 51):

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity; the

paragraphs under consideration would not materially aid the Congressional plan for promoting transportation."

Discarding this interpretation of the phrase, this Court held in that case (l. c., p. 51):

> "It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened *or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.*" (Italics ours.)

Petitioners contend that the opinion of the majority of the Circuit Court of Appeals in the present case is clearly at variance and in conflict with the foregoing interpretation of the statute by this Court and that petitioners' complaint shows that the construction and operation of the proposed extension of railroad by the respondent:

1. Will directly and adversely affect the property interests of petitioners and will cause them to suffer a financial loss;

2. Will bring about a material change in the transportation situation, which will constitute an unnecessary burden upon interstate commerce and directly and adversely affect the welfare of petitioners.

II.

Jurisdiction.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229, 43 Stat. 936 (28 U. S. C. A. 347).

III.

Questions Presented.

As already indicated in Section I of this petition the questions presented are whether the petitioners, who are commission merchants and property owners within and adjacent to the City Market of Kansas City, Missouri, are "parties in interest" within the meaning of paragraph (20), Section 402 of the Transportation Act (41 Stat. 478, Title 49, U. S. C. A., Section 1, Par. 20), and entitled "to maintain an action against respondent to prevent the respondent constructing and operating an extension of its railroad to a proposed rival produce market in Kansas City, Kansas, which will directly and adversely affect the property interests of the petitioners by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of petitioners, and for which said extension the respondent has not procured a certificate of convenience and necessity from the Interstate Commerce Commission as required by law.

IV.

Reasons for Granting the Writ.

The discretionary power of this Court to grant a writ of certiorari is urged and invoked upon the following grounds:

1. The decision and judgment of the Circuit Court of Appeals is contrary to the decisions of this Court in *Western Pacific California R. R. Co.* v. *Southern Pacific Company*, 284 U. S. 47, and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, construing the provisions of the Transportation Act (41 Stat.

456, 477, 478), and defining the meaning of the phrase "party in interest" as used in paragraph (20), Section 402 of the Act.

2. The decision and judgment of the Circuit Court of Appeals leaves in confusion the question as to the meaning of the phrase "party in interest" as used in paragraph (20), Section 402 of the Transportation Act.

3. The decision and judgment of the Circuit Court of Appeals involves an important question of federal law which should be definitely settled by this Court.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Eighth Circuit to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals for the Eighth Circuit be reversed; all based on the reasons and grounds hereinbefore recited.

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Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The decree of the District Court of the United States for the Western Division of the Western District of Missouri, holding that petitioners are not "parties in interest" who may maintain this action; that the complaint fails to state a claim upon which any relief can be granted, and directing a dismissal of the complaint, appears in the Record at page 25, and the memorandum opinion of the court appears in the Record at page 30, and is reported in 26 F. Supp. 721. The opinion of the Circuit Court of Appeals for the Eighth Circuit affirming the decree of the District Court was dated and entered February 7, 1940, and is found in the Record at page 42. (Not yet reported.)

II.

Jurisdiction.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 936, 28 U. S. C. A. 347). The date of the application for the writ may be taken as of the date of the filing of the petition in the office of the clerk of this Court.

III.

Statement of the Case.

A statement of the case is set forth in the foregoing petition under the caption "Summary and Short Statement of the Matters Involved," to which reference is hereby made.

IV.

Specifications of Errors.

1. The Circuit Court of Appeals for the Eighth Circuit erred in affirming the decree and judgment of the United States District Court for the Western Division of the Western District of Missouri adjudging and decreeing that petitioners are not, nor are any of them "parties in interest", who may maintain this action under the provisions of paragraph (20) of Section 1 of the Transportation Act. (41 Stat. 478, Title 49, U. S. C. A., Sec. 1, Par. 20.)

2. The said Circuit Court of Appeals erred in affirming the decree and judgment of the said District Court adjudging and decreeing that the complaint fails to state a claim upon which any relief can be granted, for the reason that said complaint states a good cause of action and a claim on which relief can be granted under the provisions of said Transportation Act.

3. The said Circuit Court of Appeals erred in affirming the decree and judgment of the said District Court dismissing petitioners' complaint, for the reason that said complaint states a good cause of action and a claim upon which relief can be granted under the provisions of said Transportation Act.

4. The said Circuit Court of Appeals erred in affirming the decree and judgment of the said District Court, and

in determining that the petitioners are not "parties in interest" within the meaning of said Transportation Act, because such determination is contrary to the purposes of the Act, and conflicts with the decisions of this Court, interpreting the meaning of said phrase, in *Western Pacific California Railroad Co.* v. *Southern Pacific Company*, 284 U. S. 47, and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266.

V.

Argument.

We omit argument here because the reasons given in the petition for the writ plainly state the position of the petitioners and show their right to have the writ issued as prayed.

Conclusion.

It is therefore respectfully submitted that this case is one of great importance calling for the exercise by this Court of its supervisory powers in order that justice be done herein and that the confusion and conflicts on important questions herein involved be corrected, and that to such end a writ of certiorari should be granted and this court should review the decision of the Circuit Court of Appeals for the Eighth Circuit and finally reverse it.

Respectfully submitted,

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